



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

OFFICE OF  
CHIEF COUNSEL

January 30, 2003

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MEMORANDUM FOR

Janet F. Appel  
Associate Area Counsel, SBSE  
CC:SB:1:MAN

FROM:

Stuart Spielman  
Assistant to the Branch Chief  
CC:PA:APJP:B3

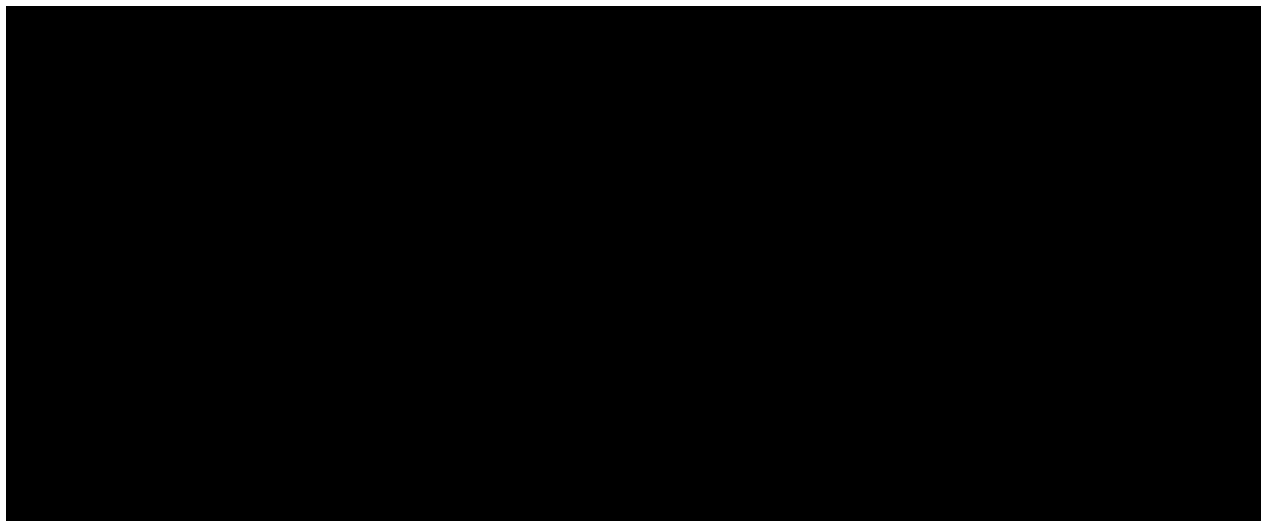
SUBJECT:

Applicability of Equitable Recoupment or Mitigation

This memorandum responds to your memorandum of November 4, 2002. In accordance with section 6110(k)(3) of the Internal Revenue Code, this advice should not be cited as precedent.

You have asked for assistance in evaluating whether or not equitable recoupment or mitigation apply in a pending case in the United States Tax Court. We rely on the facts that you have provided both in your incoming request for advice and in subsequent informal communications.

Equitable Recoupment



[REDACTED]

Any loss from an activity to which section 465 applies that is not allowed for the taxable year is treated as a deduction allocable to the activity in the first succeeding taxable year. Because of the operation of section 465, losses that are allowed in one year may be carried over to succeeding taxable years.

[REDACTED]

### Mitigation

[REDACTED]


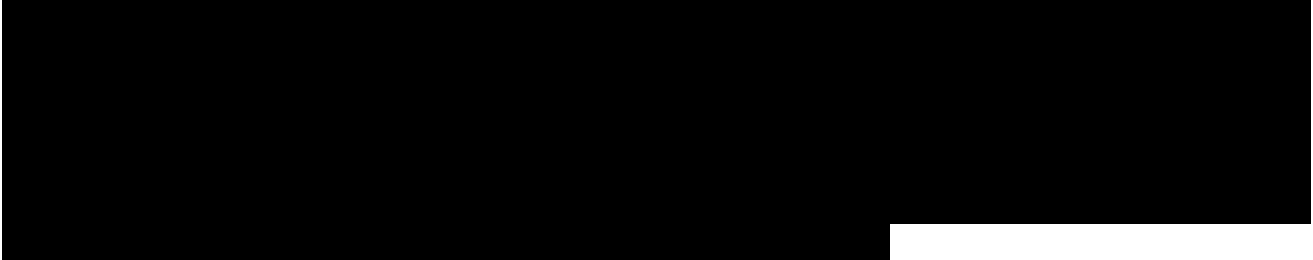
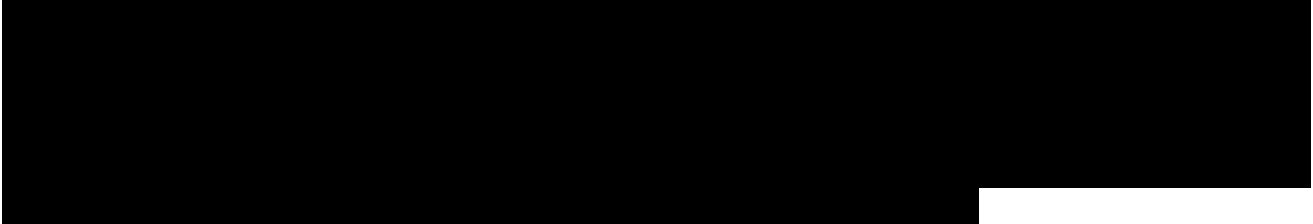
The mitigation provisions apply when there is a double disallowance as defined by section 1312(4).

[REDACTED]

Petitioner relies on Olin Mathieson Chemical Corp. v. United States, 265 F.2d 293 (7th Cir. 1959) as support for its position. In Olin Mathieson, the taxpayer, in its return for the 1944 taxable year, listed as an ordinary income loss the amount of \$168,126.22. Based on the findings of the audit, the IRS disallowed this item of loss as well as Olin's subsequent timely claim for refund. The taxpayer then filed a suit for refund in federal district court. The district court held that the loss was not an ordinary income loss but a long-term capital loss incurred in 1944. As there were no capital gains against which to utilize the losses, no refund was allowed. That judgment became final on May 7, 1956,

when by stipulation and order both parties dismissed their appeals. Olin Mathieson, 265 F. 2d at 295.

Although Olin Mathieson did not have any capital gains in 1944 against which the capital loss could be offset, it did have substantial capital gains in 1945 to which the capital losses could have been carried over and applied. The taxpayer then filed a suit for refund based on taxpayer's claim that it was entitled to the carry-over of the capital loss to 1945. Although the statute of limitations had run on the refund claim, the mitigation provisions were applicable and the taxpayer was able to use the losses in the closed year. Id.



This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

The Associate Chief Counsel (Passthroughs & Special Industries) plans to review further the operation of section 465 and the mitigation rules.

Please call if you have further questions.